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No.

SUPREME COURT OF THE UNITED STATES

October Term, 1993

DANIELA CHESLEREAN,

Petitioner,

v.

IMMIGRATION & NATURALIZATION SERVICE,

Respondent.

_____/

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in affirming the Board of Immigration Appeals' ("BIA") application of a standard other than the mandatory "well-founded fear of persecution" test as enumerated in the controlling case of I.N.S. v. Cardoza-Fonseca, 480 U.S. 421 (1987) in determining Mrs. Cheslerean's request for asylum; and in not applying the reasoning of Cardoza-Fonseca to her request for withholding of deportation?

2. Should the Court of Appeals have found that Mrs. Cheslerean's Due Process rights under the U.S. Constitution were violated when she was not allowed by the Immigration Judge to offer evidence about current conditions in Romania, particularly since the BIA subsequently took administrative notice of "drastic political changes which had taken place in Romania since (Mrs. Cheslerean's) departure from there in 1989"?

3. Did the Court of Appeals err by ratifying the BIA's novel concept of "persecution per se", an apparent bootstrapping which does not comport with alliage "persecution" as defined by the relevant case law, congressional intent, and international material on the subject?

PARTIES TO THE PROCEEDINGS

Daniela Cheslerean was the petitioner in the Court of Appeals. Respondent United States Immigration & Naturalization Service and its judicial arm, the Executive Office for Immigration Review, and its officers, the Immigration Judge and the Board of Immigration Appeals, issued the decision(s) appealed from. There are no other parties to this case.

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   e. 8 U.S.C.S. Section 1105a(a)(4), INA Section 106(a) 12,PASSIM

   f. 8 U.S.C.S. Section 1251(a)(2), INA Section 241(a)(2) 12,PASSIM

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DANIELA CHESLEREAN, the Petitioner, pursuant to Rules 10 thru 13 of the Supreme Court, respectfully requests that a writ of certiorari issue to review the judgment and decision of the Court of Appeals for the Sixth Circuit entered on October 4, 1993.

OPINIONS BELOW

The following opinions have been delivered in this case and are included in the Appendix indexed as follows:

A. Order, United States Court of Appeals for the Sixth Circuit, 8/9/93 No. 92-4308

B. Oral Decision of the Immigration Judge 8/28/91 A29437881

C. Decision of the Board of Immigration Appeals 9/16/92 A29437881

D. Order, United States Court of Appeals for the Sixth Circuit, denying motion for rehearing 10/4/93 No. 92-4308

JURISDICTION

The judgment of the Court of Appeals was entered on October 4, 1993. The jurisdiction of this Court is invoked under 28 U.S.C.S. Section 1254(1), 28 U.S.C.S. Section 1651 and 28 U.S.C.S. Section 2350.

Federal appellate court jurisdiction was under Immigration and Nationality Act, ("INA") Section 106(a), 8 U.S.C.S. Section 1105a(a)(4), reviewing a Final Order of Deportation , issued by the immigration judge

("IJ") in Detroit and upheld by the Board of Immigration Appeals ("BIA" or "Board").

Review in this Court is available under the Hobbs Act, 28 U.S.C.S. Sections 2341 et.seq. and INA Section 106, 8 U.S.C.S. Section 1105(a)(7).

TREATIES, STATUTES, REGULATIONS INVOLVED

The primary Statute involved is the Immigration and Nationality Act of 1952, as amended, sections 101(a)(42), 8 U.S.C.S. Section 1101(a)(42); 106, 8 U.S.C.S. Section 1105a; 208, 8 U.S.C.S. Section 1158; 241, 8 U.S.C.S. Section 1251; 243(h), 8 U.S.C.S.Section 1253(h)(1).

Other Statutes involved are the Refugee Act of 1980, P.L. 96-212; and the 1967 United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, 606 U.N.T.S. 267, Jan. 31, 1967, and, naturally, United States Constitution,Amendment 5 ("Due Process").

Regulations involved are Title 8 C.F.R. Sections 3.1(b)(2), 208.3(b), 208.16(b), 242.21.

Relevant portions of these citations are reprinted in the Appendix, at Section E.

STATEMENT OF THE CASE

The case arose under INA Sections 208(a), 243(h), 8 U.S.C.S. Sections 1158(a), 1253(h), application for asylum and withholding of deportation, respectively; by an alien present in the United States of America, in Michigan. That is, jurisdiction over an application for asylum under INA Sections 101(a)(42), and 208(a), 8 U.S.C.S. Sections 1101a(42), 1158(a). Original jurisdiction is in the United States Immigration and Naturalization Service, Board of Immigration Appeals (Executive Office for Immigration Review).

Jurisdiction of the Court of Appeals arises under Section 106(a) of the Immigra-

tion and Nationality Act, 8 U.S.C.S. Section 1105a(a), and the Hobbs Act, 28 U.S.C.S. Sections 2340 et.seq.

This case is before the Court on a petition seeking review of a decision of the Sixth Circuit Court of Appeals upholding the Board of Immigration Appeals' final order of deportation against petitioner.

Deportation proceedings were initiated against petitioner by the INS with the issuance of an order to show cause on October 18, 1990. The order to show cause charged petitioner with being deportable under section 241(a)(2) of the Act, 8 U.S.C.S. Section 1251(a)(2), as an alien who remained longer than permitted in the United States. In proceedings below, an immigration judge found petitioner deportable as charged, ineligible for asylum, but eligible for the

privilege of voluntary departure. (App. B)1/ She timely appealed to the Board. BIA dismissed the appeal on 9/16/92 (App. C).

Timely petition for review in the Sixth Circuit Court of Appeals followed. Sixth Circuit dismissed the appeal and upheld the Board's decision on August 9, 1993 (App. A). Timely petition for rehearing was filed and was dismissed on October 4, 1993. (App. D)

This petition for writ of certiorari, followed.

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1. Citations to Appendix will be as follows: (App. ___, .) App. followed by index No., followed by page in appendix, if needed.

STATEMENT OF FACTS

Petitioner is a native and citizen of Romania who entered the United States in April, 1989, as a nonimmigrant visitor for pleasure who was authorized to remain until October 15, 1989. During her period of authorized stay, she duly filed a request for asylum with the District Director of INS, Detroit, Michigan, which was denied on October 18, 1990, in conjunction with the issuance of an order to show cause why petitioner should not be deported, asserting she was deportable for having remained in the United States longer than permitted.

Petitioner admitted the allegations in the order to show cause, i.e. "overstay". The IJ subsequently found petitioner deportable. Petitioner applied for relief from deportation in the form of asylum, witholding of deportation and voluntary departure. In support, Petitioner submitted several news

articles, an affidavit dated March 27, 1991, and a letter dating from November, 1980, written by petitioner's mother to a local court in Romania. Petitioner testified in support of her aylum claim at her asylum hearing. She testified quite extensively in regard to the persecution her family had been forced to submit to by the Romanian government because of her family's close association Western people, and her belief that the same people are still employed in similar capacities in Romania, remaining a threat to her and her family. She testified that she was fearful of renewed persecution if she returned to Romania, having now been revealed to be a "traitor" to the current regime.

Mrs. Cheslerean testified that her father was struck by a car and killed under mysterious circumstances, after having been warned not to meet with his Western

colleagues, on the evening of the day that he had met with those colleagues. Mrs. Cheslerean's mother was present at the scene of the accident. Mrs. Cheslerean testified that because of the circumstances surrounding the accident and the lack of prosecution of the perpetrator and other impressions she formed from the information available at the time, that her father's death was attributable to action by forces within the government that were inimical to his stated and acted out desire to maintain relationships with his friends in the West.

Mrs. Cheslerean's mother departed Romania for the United States in November, 1987 and remarried. Mrs. Cheslerean testified that after her mother's departure, official pressure was directed against petitioner personally and against her husband. She was interrogated on more than one occasion as to why her mother had left and her relationships

with foreigners. Her husband was subjected to similar interrogation. Their house was searched on the pretext of looking for foreign currency.

Her position at work became intolerable. In April, 1988 she was demoted for no stated reason. She believes it was because of her family's relationship with "outsiders". She testified that she began to be followed. Certain "warnings" were relayed to her that her life was in danger, like her father's had been. Her husband was not only demoted, but he was transferred to a facility more than 50 km away, which would entail him having to leave his family and residence in order to show up at work during the week.

Finally, she testified that the pressure upon her family became intolerable, and Mrs. Cheslerean and her husband managed to purchase passports for $5000 apiece, money

which they borrowed from Western sources, and they managed to obtain visas and escape Romania.

Mrs. Cheslerean testified that when she does manage to contact Romania, she feels as if someone is listening in on the conversations. The warnings about not coming back have been repeated to her.

At the evidentiary hearing, counsel for Mrs. Cheslerean attempted to corroborate Mrs. Cheslerean's testimony with testimony of her mother, but the IJ refused to allow her to testify. In addition, counsel attempted to put on another witness, who was familiar with current conditions in Romania. The IJ, without hearing the testimony, determined it was irrelevant.

The IJ denied asylum and withholding of deportation, but granted request for voluntary departure.

Appeal, as related, followed.

REASONS FOR GRANTING THE WRIT

ARGUMENT

1. Courts are confused as to how, or whether, to follow Cardoza-Fonseca.

The basis for this petition for Writ of Certiorari is that the opinion issued by the Sixth Circuit Court of Appeals is inconsistent with the controlling decision of the Supreme Court, Cardoza-Fonseca, and its interpolation by Elias-Zacarias 112 S.Ct. 812, and subsequent decisions of the Circuit Courts pursuant to those decisions. By doing so, the Sixth Circuit has ratified an independent Standard of Review by the Board of Immigration Appeals that is not justified by either the prior decisions of the Sixth Circuit ,e.g. Doe v.I.N.S., U.S. Dept. of Justice, 867 F.2d 285 (6th Cir. 1989) or the specific directives of the U.S. Supreme Court (Cardoza-Fonseca).

Applying no standard is equivalent to applying the incorrect standard. Is Cardoza-Fonseca the law or is it not? Are the Circuits free to apply some other test?

The Court of Appeals admits, in its opinion, (App A, 9) that "there is no indication that the Board applied this test (well-founded fear under Cardoza-Fonseca) to Cheslerean's Asylum claim."

The Court concluded, instead, that the Board found that Cheslerean had "presented no evidence that the present Government in Romania presently is, or ever will be, interested in persecuting her for any reason."

The Literature and Legislative history leading up to the Refugee Act of 1980, P.L. 96-212, including the United States' signing of the 1967 United Nations Protocol Relating to the Status of Refugees, indicate that the intent of Congress was to liberalize the

Asylum law and harmonize the United States government's position on refugees with the rest of the world's. Cardoza-Fonseca seems consistent with that view. Cases decided in the wake of Elias-Zacarias, however, have sent the law off on a dangerously restrictive tangent that is obviously at odds with the promises of our international commitments, i.e. federal law enacted by the signing of treaties. Unpredictability is the dominant feature of the current state of the law. Unpredictability leads to lack of respect for the law, and ultimately, to disregard for the law. It is imperative for this Court to put the law of asylum back on a consistent path.

2. Petitioner was deprived of Due Process.

The Board based its finding that the present government in Romania had no interest in persecuting petitioner on (1) her not presenting evidence on this point (even

though the IJ refused her request to present a witness on current conditions in Romania), and (2) its taking "administrative notice (footnote omitted) of the drastic political changes that have occurred in Romania since the respondent's departure from there in April 1989." (App. C ,11). The taking of administrative notice appears to have been improper. See, e.g. Kapcia v. I.N.S., 944 F.2d 702, 705, (10th Cir. 1991); and Rivera-Cruz v. I.N.S., 948 F.2d 962, 967 n4 (5th Cir. 1991).

Thus, the Appeals Court upheld both the decision of the Immigration Judge not to allow the testimony; and the decision of the Board that Cheslerean had presented no evidence in regard to the present regime in Romania. Putting a potential deportee in such a legal predicament is certainly not within the tradition of our American jurisprudence, and is in violation of the due

process clause of Amendement 5 to the Constitution, See, e.g. Shahandeh-Pey v. Immigration & Naturalization Service, 831 F.2d 1384 (7th Cir. 1985).

3. "Persecution per se" is not a recognized legal concept.

The Court of Appeals placed especial reliance upon the Board's finding that Cheslerean had not been persecuted in the past, opinion, (App.A ,4).

The Court of Appeals upheld the Board's finding that "demotions at work and the search of their home did not establish persecution per se, Opinion p. 3 (App.A, 6).

Nowhere in all the literature or in all the case law can be found a definition of "persecution per se". However, the 1978 Amendments to the Immigration & Nationality Act, P.L. 95-49, in its legislative history, as stated in 1978 U.S.Code Cong. & Admin

News, at 4704, states "The harm or suffering need not be physical but may take other forms, such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life." The deliberate demotion, and transfer to a location more than 50 km away in Romania, so that Mrs. Cheslerean's husband could not live with his family and still remain employed, would seem to fit well within these criteria.

Elias-Zacarias does not seem to change this definition, but it adds, in the context of a political refugee, that there may be a further requirement of proving motivation on the part of the governmental entity.

However, the analytical literature has been fecund in motivational analysis, though mainly relating to governmental motivation in

the context of refugee law.2/

2.Particularly enlightening is the article by Graves, M. From Definition to Exploration: Social Groups and Political Asylum Eligibility, 26 San Diego L.Rev.739,810-12.

> The more common situations--those which prompted the 1951 Convention, the 1967 Protocol, and the 1980 Refugee Act--involve generally 'oppressive' often unstable governments which treat certain groups in particularly abusive ways. Such governments sometimes do not care, and often do not explore carefully, whether target individuals actually have disfavored views or traits (footnote omitted). When such attacks single out particular 'social groups'--even if conducted with utter indifference as to individual characteristics--they are 'covered' persecution.

The problem of motive in relation to Elias-Zacarias is also discussed in Fielden, C. Persecution on account of Political Opinion: "Refugee" Status after INS. v. Elias-Zacarias, 112 S.Ct.812 (1992), 67 Wash.L.Rev. 959, 976.

4. The INS is overruling Cardoza-Fonseca "in the field."

Cardoza-Fonseca is being overruled "in the field". INS feels free to apply whatever standard it may choose, willy-nilly, or in this case, no standard at all, to decide asylum and withholding of deportation cases.

In this case, the BIA ignored Cardoza-Fonseca and used other unclear criteria, seemingly related to sufficiency of evidence, but grounded in the novel concept of "persecution per se". Analysis is deterred because the criteria are not formalized. The other of the two main underpinnings of the Board's decision was its taking administrative notice of the fact of drastic political changes in Romania.

Proof in asylum cases is generally conceded to be hard to accumulate. It is well-established that asylum cases are rarely corroborated and proceed with little more

than the testimony of the potential asylee. In this regard, Cardoza-Fonseca and other cases stress the fact that fear is something that is personal to the potential victim, and cannot often be corroborated by the most ideal types of proof. In other words, the fear felt by the asylum applicant often has a strong subjective component.

The Board injected, and the Court of Appeals ratified, the requirement of petitioner proving "invidious" motivation on the part of the persecuting government, even though Elias-Zacarias appears to limit its motivational analysis to the "political" refugee context, rather than the social grouping advanced in support of Cheslerean's claim (people with excessive contacts with Westerners during the Ceausescu era, or in these times, people who have attempted to obtain political asylum in the United States). When Mrs. Cheslerean lived in

Romania, she tried to make her life there tolerable by maintaining and cultivating ties with friends in the West, it is Mrs. Cheslerean's firm belief that the regime in Romania tried to punish her and her family.

Significant negative events befell Mrs. Cheslerean and her family in Romania. Things happened to her and her family that can be attributed to nothing other than governmental action, and if true, they consist of persecution. The "why" is because she was a member of a group the Romanian government considered dangerous. Once she became persecuted, she became a member of another group, i.e. those "traitors" that have been singled out by the government as being against the government.

Mrs. Cheslerean cannot go back to Romania. Her life there is ruined. She refused to go along with her humiliation, degradation, and the diminishment of her

value as a person, at the hands of her government, and she risked all to come to America. There is no life for her and her family in Romania. She has been in the United States for more than 4 years and has established a life here.

The law under Cardoza-Fonseca takes a real look at the plight of the refugee in these troubled times. It is a tragedy that the INS is being allowed to abort the spirit and intent of our international obligations.

The decision in this case comes very close to dismissing Mrs. Cheslerean's fears out of hand. One question remains. Whither the "well-founded fear of persecution" standard?

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Sixth Circuit.

We request that the Court of Appeals be reversed. We request that the decision of the BIA be overturned, and that this case be remanded back to the INS for it to consider granting Mrs. Cheslerean asylum in the United States of America; or, in the alternative, that it be remanded to the INS to be reopened and another hearing granted so that Mrs. Cheslerean may present evidence which was not allowed or unavailable at the time of the initial hearing.; or, in the alternative, the withholding of her deportation.

Submitted this 2d day of January, 1994.

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